In the United States Circuit Court of Appeals for the Ninth Circuit

No. 3381

BRUCE RICHARDS AND AUGUST OESS,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

BRIEF OF DEFENDANT IN ERROR

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ARGUMENT

The several questions presented by the brief of the plaintiffs in error will be here discussed in five subdivisions, each designated by a Roman numeral, and conforming to the grouping of assignments adopted in the brief of the plaintiffs in error.

I.

As to the contention that the evidence is insufficient and that there is a variance between the indictment and the proof, it is important, first, to notice that the prohibition of section 240 of the Criminal Code is against the interstate shipping and causing to be shipped of any package containing intoxicating liquor,

> "unless such package be so labeled on the outside covering as to plainly show the name of the consignee, the nature of the contents and the quantity contained therein."

This phase of the case is presented by the plaintiffs in error as if the statute provided, and it were necessary for the Government to prove, shipment "to a fictitious consignee (or) by a false label." (Brief of plaintiffs in error pp. 14, 17). It is manifest from a reading of the statute that all that is necessary to support a conviction is interstate shipment of a package containing intoxicating liquor, the outside covering of which does not show all of the three things required, namely, name of consigee, nature and quantity of contents.

The indictment follows strictly the language of the statute.

It is contended that because before the trial Lucas was dismissed from the case, neither of the plaintiffs in error can be convicted of conspiracy with him; and that because neither of them can be so convicted the judgment must be reversed. For the sake of the argument the proposition of law involved may be conceded, but the indictment charges a conspiracy among the plaintiffs in error and four others. After Lucas and Boomer were dismissed, four remained. Toles and Symons were acquitted by the jury. If there is substantial evidence of the conspiracy as between Oess and Richards, the plaintiffs in error, that is sufficient, because they were both found guilty. Thus only two questions are presented, (a) Did Oess and Richards conspire with each other, and (b) Did their conspiracy contemplate the interstate *shipment* of whiskey from California into Washington.

(a) The plaintiffs in error say: (Brief p. 17)
"There is evidence tending to show that Lucas talked with plaintiffs in error before he went to California, and intended to *ship* intoxicating liquors into the state of Washington."

In addition to testimony as to numerous conversations between Lucas and each of the defendants in error separately in which the projected transaction was dis-

cussed and planned, there is this testimony of Lucas: (Record p. 28)

> "A few days before I went away I had a talk with Oess and Richards and we discussed about buying whiskey and bringing it into Centralia, and Oess suggested that he drive his truck along the prairie and unload the booze on the prairie into his truck, and Richards says: 'That's all right for me.' "

It is unnecessary to search the record further for evidence of an agreement between the plaintiffs in error on the subject of their getting whiskey through Lucas.

(b) The following excerpts from the record show that it was understood among Lucas and the plaintiffs in error that Lucas was going to California, and was to get the liquor there:

Testimony of Joe Lucas: (Record p. 27)

> "I contemplated, about February 7th last, a trip from Centralia to San Francisco, and about three weeks before I left I had a talk with August Oess, one of the defendants, in regard to it. He asked me if I would bring him back some whiskey, and I said, 'Yes.' We had several conversations along the same line. These conversations with Oess always referred to when I was going to California. I also had a conversation on the same subject with the defendant, Bruce Richards, about the same time. He asked me if I was going to Frisco and would I bring him back some whiskey, and I told him 'yes.' I had several subsequent conversations with him. I went to San Francisco

> on February 8th this year, and about two weeks before I left, Mr. Richards gave me $200.00 at one time, and $40.00 at another time, in cash. I asked him what kind of whiskey he wanted and he said he preferred bottled in bond in quart bottles."

Then follows the testimony above quoted as to the conversation among Lucas, Oess and Richards about buying whiskey and bringing it into Centralia, in which it was suggested by Oess that the whiskey be unloaded on the prairie, and from there carried in his truck, to which proposal Richards assented.

Lucas further testified: (Record p. 30) That the third day after his return to Centralia from California he had a conversation with Oess, and Richards, in his, Lucas', apartments, in which he told them that the whiskey had been lost. Detailing that conversation further, this witness testified:

> "After I got through telling Oess and Richards, Oess says: 'Joe, you were to bring this whiskey up in a pipe-organ and I do not know, if I had known it was to come in dry batteries, whether I would have gone into it or not.' Richards said that he thought it was to be brought up in the pipe-organ also, and seemed to be suprised, and expressed some sentiment that we lost it. Afterwards, Mr. Richards and Oess and Boomer came to see me at my apartments. Richards says: 'We came for our whiskey or our money.' I says: 'I cannot give you the

> whiskey,' and then my wife says: 'Give them back their money and pay them in a check. Then it was talked over that we ought to do something for Platt. Mr. Richards says: '*Yes, we got him into this, we ought to help him out.* (Record p. 32). At another time, in my apartment, in the presence of Oess and Boomer, Richards said that somebody had squealed; that he thought there was only to be four in this; he said, too many in it, as he looked at it. If he had thought there was going to be more than four in it, he would not have gone into it. He understood that Oess, myself and himself, and Jerry Driscoll were the only ones in it."

It should be noticed also that Oess, in testifying as to a conversation between Lucas and Richards, at which Oess was present, (Record p. 68), after denying that he had any memory of California being mentioned, quotes Richards as saying to Lucas that the latter was to bring him *back* some brandy.

It is submitted that neither the manner in which, nor the means by which the conspiracy contemplated the bringing of the liquor into Washington is an essential or material element of the crime, if only it was agreed that the liquor should be *shipped* or caused to be *shipped.* That the agreement contemplated that the liquor should be *shipped* is evidenced by the following from the record. Testimony of J. H. Boomer: (Record pp. 39-41).

> "I heard it talked among myself, Oess and Richards that he (Lucas) was going to ship a pipe-organ back." "They (Rich-

ards and Oess) told me that Mr. Lucas was trying to get away with this money, and would never *ship* the goods. Oess and Richards claimed that Lucas *shipped* the stuff in batteries instead of the pipe-organ. They understood he was to *ship* it in quart bottles in this pipe-organ, and that is one thing they claimed that Lucas was defrauding us out of our money."

"Mr. Richards came to my place of business at Centralia both before and after we were arrested. He claimed that Mr. Lucas had no business to *ship* liquor in the battery cans; it was supposed to be *shipped* in a pipe-organ, or in case lots; I do not know just how, and that is the only thing he did not like."

Testimony of Nellie Lucas: (Record p. 50).

"Mr. Richards was excited and said, 'They have got us all; they are going to arrest every one of us and take us to jail.' Now, he says: 'I will tell you what we are going to contend—we are going to contend that you were going to *ship* the booze in the pipe-organ and bonded liquor and we are going to contend that the booze came in at the Milwaukee depot and we have already got our booze, and that you had already shipped it in.' "

Testimony of J. W. MacCormack: (Record pp. 56, 57).

"I asked Richards if he had admitted giving his money to Lucas for the purpose of *shipping* bonded whiskey from San Francisco to Centralia, and had also stated that to John Berry, to go to the Dale Hotel in Centralia and make the same admission in the presence of myself and Agent McIntosh. *He agreed to do so,*

> but asked me if, before he went to the Dale Hotel with the purpose of making this admission, I would accompany him to Oess, and I agreed to. He introduced me to Oess, and in Mr. Richard's presence I told Mr. Oess who I was and why I was there. I told Oess that Mr. Richards had already admitted he had given $240.00 to Lucas for *this purpose;* that I understood that Oess had given $400.00, and Oess admitted that he had given $400.00. After Richard's arrest in the engineer's office in Chehalis, in the presence of Mr. McIntosh, he admitted that he had given money to Lucas for the purpose of purchasing bonded whiskey in San Francisco to *ship* to Centralia,."

The last element of the offense, namely, the intended shipment without the markings required by statute on the outside coverings of the packages is supplied by the testimony which runs throughout the record, and which in part already has been quoted, to the effect that it was agreed that the liquor should be shipped in the pipes of a pipe-organ that Lucas contemplated buying in California, and also by the circumstance that the statute of the state of Washington at the time of the agreement prohibited all shipments of intoxicating liquor into that state for beverage purposes, except in limited quantities and upon permits issued by county auditors. (Laws of Washington 1915, p. 2). The jury might reasonably deduce from the evidence that according to the agreement the liquor was

to be shipped in the pipes of a pipe-organ that the parties mutually understood and intended that the packages should not have on the outside covering the name of the consignee, or the nature and quantity of the contents, because that, the court judicially knows, is a most novel way of packing whiskey for shipment. Further, the defendants, being charged wnth knowledge of the state law, knew that unless the liquor should be marked in conformity to the terms of section 240 of the Criminal Code the shipment of it into the state of Washington would be an offense against the laws of that state, and knew that if the packages should be so marked it would be impossible for delivery to be made to them. The agreement must be construed as having been made in contemplation of the law, and with propriety the question of the intent to ship without proper markings could have been submitted to the jury, and by the jury found against the defendants, from the bare fact that there was an agreement to have whiskey shipped from California into Washington, without the further evidence that it was agreed that it should be shipped in the pipes of a pipe-organ.

It is submitted that further discussion is unnnecessary to establish the proposition that there was sufficient evidence which conformed to the allegations of the

indictment to take the case to the jury, and to support the judgment.

Of the assignments discussed in pages 13 to 18 of the brief of the plaintiffs in error there remains to be noticed only assignment 14, which is predicated on a question propounded on cross-examination to a character witness. (Record p. 63). The question was answered favorably to the defendants.

Assignments 8 and 9 are discussed in the brief, pages 19 to 32, inclusive. Numerous authorities are cited and quoted from to the point that declarations of one conspirator made after the termination of the conspiracy will not bind another. Of course that is the law. There is also, however, the further well known proposition that evidence of admissions by a defendant are always competent. The matter objected to appears on page 39 of the record. The witness Boomer testified that after the liquor had been seized "I heard it talked among myself, Oess and Richards that he (Lucas) was going to ship a pipe-organ back." Declarations of that kind among Boomer, Oess and Richards are competent as admissions for what they are worth, as against Oess and Richards. In the same connection the witness gave further testimony about his having asked Lucas to slip in some whiskey for him. As it appears in the record, the objection and the motion to strike go to all

the above mentioned testimony of the witness, and even if that about Boomer's request to Lucas were objectionable, the objection and the motion to strike both were properly denied because they went to matter some of which is unobjectionable.

Assignment 9 is directed to the overruling of an objection to a question propounded to Boomer as to whether Lucas had said anything to him about what he was going to do in connection with a criminal prosecution. (Record p. 40). The answer was in the negative —so that the plaintiffs in error were not prejudiced.

Certain rulings of the court on the admissibility of evidence by the witness MacCormack are criticised in the brief on pages 24 to 27, inclusive. This alleged objectionable matter appears in the record, pages 51 to 54, inclusive, and need not be discussed further than to notice that all matter referred to was on motion of counsel for the plaintiffs in error struck out by the court, and the jury were instructed to disregard it. (Record p. 55).

With reference to the argument included in pages 24 to 32, inclusive, it should be said that nowhere in the record is there evidence which was permitted to go to the jury, over objection, of any extra-judicial declarations on the part of anybody other than the plaintiffs in error themselves, or of another or others in their

presence, or the presence of that one of them against whom such declaration was admitted.

II.

Assignments 3, 4, 5 and 6 all relate to rulings of the court on the admissibility of testimony of the witness Jack Platt. (Record pp. 35-38, inclusive). The only argument advanced in support of these assignments is based upon the proposition that there is no sufficient evidence of a conspiracy among the plaintiffs in error and Lucas; and that evidence of acts of Platt cannot be used to establish the conspiracy. The question of the sufficiency of the evidence of conspiracy has already been discussed.

III.

Assignment 7 goes to the admission in evidence, over objection, of two pint bottles of whiskey, one Old Taylor and the other Sunnybrook, because these exhibits were not sufficiently identified. (Record pp. 37-38). The objection, the exception and the assignment all go to the admission of both exhibits. Platt testified as to exhibit 5 as follows: (Record p. 37) "I put in three cases of bonded goods, whiskey." Exhibit 5 is identified as the whiskey. That is a sufficient identification of exhibit 5 to make it admissible. And as against the blanket objection against exhibits 5 and 6, both were admissible. It should be observed (Record

p. 38) that counsel did not move to strike the testimony as to these exhibits, or that the exhibits be withdrawn from the consideration of the jury, after the witness testified on cross-examination that he could not swear that the liquor introduced in evidence was the same liquor shipped. (Record p. 38) In any event, however, the witness testified that exhibits 5 and 6 were of the same kind as those he had shipped. And, as counsel, and no doubt the jury, well know, one pint of Sunnybrook or Old Taylor whiskey looks almost exactly like another. And the identity of these exhibits was not of importance, so long as the witness had testified that he shipped whiskey. It is not conceivable that the cause of the plaintiffs in error was prejudiced by the admission in evidence of these two exhibits, especially in view of the testimony of Platt on cross-examination that he could not swear that these exhibits were the same liquor that he shipped.

IV.

Assignment 18 is directed generally to the admission as evidence of the testimony of an expert as to the prevailing prices of 3 Star Henessey brandy, the kind that Richards claims he contracted for, and various brands of whiskey, before the prohibition law of Washington—on January 1st, 1916. This evidence was offered to rebut the testimony of Richards to the effect

that he contracted with Lucas for six cases of 3 Star Henessey Brandy, at $40.00 per case; (Record p. 72) and that he did not want whiskey, but if Lucas could not supply him with a full order of brandy he would take whiskey at the same price to make up the difference. (Record p. 75). If for no other purpose, this evidence was admissible to show the disparity in prices, at the most recent time at which there were market quotations, between the brandy and whiskey, the wholesale price of the former at that time being, as Mr. O'Neil testified, $18.00 a case, while various well known brands of whiskey at the same time ranged in price from $8.00 to $11.50 a case. Counsel contends that this evidence was highly prejudicial, but his ingenuity has not discovered any reason for that conclusion — and none suggests itself.

V.

Assignment 15 goes to the overruling of an objection to the question propounded to the plaintiff in error, Oess, on cross-examination as to whether he could offer an explanation as to why Lucas had testified against him and Richards as he did. The record shows that on his examination in chief this witness had flatly denied much of the testimony of Lucas. The witness had testified that he had known Lucas and that they had been friendly several years. If Lucas had a motive for

testifying falsely against that defendant that would have been material as affecting Lucas' credibility; and if the defendant Oess had known of the existence of that motive it would have been competent for him to testify about it. In fact, he did testify as to what he thought the motive was, but if he had been unable to assign any motive and had so testified in response to this question, no prejudice would have resulted to him. The latitude permissible in cross examination is very broad, especially in the case in which the defendant is the witness under examination, when that latitude is almost wholly within the discretion of the court.

Assignment 16 goes to the refusal of the court to strike out the answer of the witness to the question involved in assignment 15. No authority is cited in support of either of these assignments, and no reason is advanced why the answer to the question should be struck. It is submitted that this cross examination was proper.

Respectfully submitted,
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Receipt of copy of within brief on October 13, 1919, is acknowledged.

of Attorneys for Plaintiffs in Error.